

***United States Court of Appeals
for the Second Circuit***



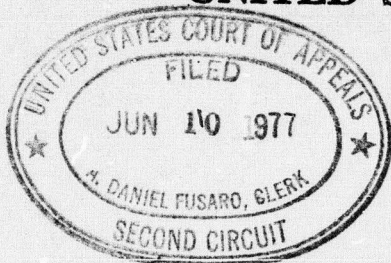
**BRIEF FOR
APPELLANT**

77-7180

ORIGINAL
WITH PROOF
OF SERVICE

To Be Argued By
CARL A. SCHWARZ, JR.

UNITED STATES COURT OF APPEALS



for the

SECOND CIRCUIT

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner-Appellee,

- against -

KENTILE FLOORS, INC.,

Respondent-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT-APPELLANT

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(6382B)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7180

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DISTRICT NO. 15, INTERNATIONAL :
ASSOCIATION OF MACHINISTS AND :
AEROSPACE WORKERS, AFL-CIO, :
Petitioner-Appellee, :
- against - :
KENTILE FLOORS, INC., :
Respondent-Appellant. :
-----X

BRIEF OF RESPONDENT-APPELLANT

STATEMENT PURSUANT TO RULE 28

The decision below was rendered by Judge Charles L. Brieant, of the United States District Court for the Southern District of New York on March 16, 1977.

ISSUES PRESENTED

I.

Should an arbitration award be vacated and denied enforcement because the arbitrator sua sponte imposed upon the collective agreement and long-standing practice of the

parties the procedures of the National Labor Relations Board regarding pre-award interest on back pay?

II.

Can pre-award interest legitimately be awarded by an arbitrator in the absence of a finding by the arbitrator that such interest is appropriate to remedy the dispute under the collective agreement?

III.

Should an arbitration award of pre-award interest on back pay be enforced when such remedy was not requested by the grieving union?

IV.

Is pre-award interest enforceable when neither party had the opportunity to offer evidence or be heard on that issue?

STATEMENT OF THE CASE

The Proceeding Below

This proceeding was initiated in the United States District Court for the Southern District of New York by the

petition of the IAM* to confirm an arbitration award issued by Bertram Kupsinel on July 1, 1976. Jurisdiction was invoked pursuant to §301 of the Labor-Management Relations Act, ("LMRA") 29 USC §185 and the U.S. Arbitration Act, 9 USC §1 et seq. Kentile cross-petitioned to vacate so much of the award as granted pre-award interest on the back pay awarded.

While characterizing Kupsinel's award as "bizarre" (A-61)** Judge Brieant found that the arbitrator had the "right to be wrong" and on March 16, 1977 rendered his judgment denying the cross-petition and confirming the arbitration award.

On April 15, 1977 Kentile filed its Notice of Appeal.

Statement of Facts

None of the facts before the Court below were in dispute. They are summarized as follows:

Kentile and the IAM have had a collective bargaining relationship for over twenty years (A-38). The present collective agreement ("Agreement") is effective from July 8, 1975 to July 9, 1978 (A-11).

* Plaintiff-Appellee, District No. 15, International Association of Machinists and Aerospace Workers, AFL-CIO, is referred to herein as the "IAM", and Respondent-Appellant, Kentile Floors, Inc. is referred to herein as "Kentile".

** (A-) is our reference to the Appendix on Appeal.

Kentile's operations require that maintenance department employees work overtime in order to assure that production machinery is kept operable. The IAM conceded overtime was not voluntary and the arbitrator found that, under the provisions of Article 10 of the Agreement and plant practices, when sufficient employees do not make themselves available for overtime work, the least senior employees are required to perform the necessary overtime (A-24).

On Friday, December 5, 1975, to cover two emergencies, Kentile required overtime for seven maintenance department employees and failed to obtain the number of employees needed from volunteers. Kentile's Maintenance Superintendent warned the IAM that the most junior available employees, William Jute and Stephen Anzueta, would be terminated if they refused to work overtime. They continued to refuse to work overtime and were terminated (A-25).

In Article 30 of the Agreement between it and the IAM, Kentile "retains the right to discharge or discipline any employee for just cause". (A-21) This article further provides that discharge cases shall come under the method of adjusting grievances as provided in Article 26 (A-21). Failing an amicable settlement, grievances are subject to arbitration under Article 27 (A-20).

Failing to amicably settle the Jute and Anzueta discharges, the Union and the Company submitted the matter to Arbitrator Bertram Kupsinel.

The issue submitted to Arbitrator Kupsinel was "Whether or not Stephen Jute and William Anzueta were discharged for just cause, and, if not, what shall be the remedy?" (A-23)

The arbitrator chose to reduce the punishment imposed on Jute and Anzueta from discharge to unpaid suspensions of one and two weeks respectively. Kentile was required to offer reinstatement without further loss of wages, seniority or other privileges (A-31). Then, although not requested or suggested by either party, or suggested by the arbitrator at the hearing when the parties would have had an opportunity to present their position on the matter, the arbitrator awarded that:

"The calculation of back pay shall be in accordance with National Labor Relations Board procedures. Interest at 6% per annum will be added to the back pay due. See Isis Plumbing & Heating Co., 138 NLRB 716."* (A-31)

* The NLRB in Isis Plumbing & Heating Co., 138 NLRB No. 97, for the first time in 1962, fifteen years after the 1947 Act established their agency, instituted the practice of imposing interest on back pay "to encourage compliance with Board Orders". (138 NLRB at 720.)

Except for the payment of pre-award interest on the back pay, Kentile has otherwise fully complied with the award (A-8,38).

ARGUMENT

I.

Interest On Back Pay Is An Unusual Remedy For Arbitrators to Award

While back pay is a usual remedy granted by arbitrators in arbitration cases, an award of interest on back pay is highly unusual.

In "How Arbitration Works", Elkouri and Elkouri,* the most noteworthy authority on labor arbitration in the country, and a work which Arbitrator Kupsinel, himself, in his opinion states is a "well recognized text"** states at page 357:

"The question of interest on the principal sum awarded has sometimes arisen. Arbitrator, Stanford H. Kadish, refused to order payment of interest on his award of holiday pay since neither the collective agreement or the submission expressly authorized him to order the payment of interest and 'it is not customary in arbitrations for the arbitrator to grant interest on claims which he finds owing.' A number of arbitrators have likewise expressly refused to award interest, but interest has been awarded in some instances."

* Bureau of National Affairs, Inc., Third Edition, 1973.

** Kupsinel opinion, page 7, (A-30).

The expanded statement of Arbitrator Kadish cited above is even more revealing of the usual practice followed by arbitrators in this regard, he states:

"... it is not customary in arbitrations for the arbitrator to grant interest on claims which he finds owing. If the contract or submission agreement had expressly authorized the arbitrator to grant interest, the matter would be different. In view, however, of the almost unanimous practice on the part of the arbitrators not to grant interest and the failure of the parties to authorize the arbitrator to do so here, I would think it highly inappropriate to do so. Certainly, the Union has presented no reason for awarding interest in this case which cannot be said to apply equally in any arbitration where a sum of money is involved. For these reasons the claim for interest is denied." Kadish, Stanford H., Arbitrator, Intermountain Operators League, 26 LA 149, 154 (1956).

Arbitrator David C. Altrock, in a decision involving Westinghouse Electric Corp., 47 LA 621 (1966) states:

"The Union has requested six percent (6%) interest on lost wages as well as the wages. The present weight of authority appears to be that interest is not granted unless the disciplinary lay-off was wilfull, capricious, arbitrary and unconscionable. Such cannot be found regarding the present disciplinary days off."

In the Award at issue here, Arbitrator Kupsinel in fact found that discipline by the Company for the grievants' refusal to work overtime was appropriate, but that a period

of suspension without pay rather than discharge was the remedy that he would impose. It can hardly be said, under these circumstances, that Kentile acted willfully, capriciously, arbitrarily or in an unconscionable manner.

Arbitrator William F. Dolson, in an arbitration involving the Dover Corp., 45 LA 705 (1965) states:

"In ordering that the grievants be reinstated with back pay, less earnings for the period from July 17, 1965, until his reinstatement period, he ordered that the reinstatement shall be without loss of seniority or other contractual rights and benefits. Interest is not traditionally granted in arbitrations and is denied."

These authorities reflect the general practice of arbitrators. The weight of authority sides with the view that interest on back pay awards is unusual and is not the generally accepted practice.* Note that all of these arbitration awards under collective agreements came after the NLRB had decided Isis.

II.

Neither the Collective Bargaining Agreement
Nor the Submission to the Arbitrator Authorized
The Arbitrator to Make an Award of Interest

In the long history of bargaining between Kentile and the IAM which spans a term of over twenty years, an

* The Court is also referred to the following cases which denied specific requests to arbitrators by the union for interest on a back pay award, Arbitrators Willingham in Gregory Galvanizing & Metal Processing, Inc., 48 LA 782, 788 (1967); Keefe in American Steam Ship Co., 44 LA 530, 540 (1965); Crawford in Baw-Knox Co., 43 LA 247, 249 (1964); Koven in Demond National Corp., 41 LA 1310, 1313-1314 (1963); DiLeone in American Meter Co., 41 LA 856, 862 (1963); Davis in Hampton Corp., 39 LA 177 179 (1962).

arbitrator has never granted interest on an award of back pay in a dispute between these two parties (A-38). Both Kentile and the IAM are sophisticated parties to collective bargaining. If the IAM or Kentile had intended to have interest apply to back pay awards by an arbitrator, they could have so stated that in the collective bargaining agreement. In light of the unusual nature of such relief, an arbitrator should not have the authority to make such an award unless he is specifically authorized to do so in the collective bargaining agreement between the parties. We note that Arbitrator Kadish, as cited by Elkouri, p. 6, supra, points out that the lack of a specific authorization in the agreement was a specific factor in denying the union's request for interest in Intermountain Operators League.

Beyond the collective bargaining agreement not authorizing interest on such payments, the IAM, in the course of the hearing, did not even request interest as part of the relief that it was seeking. (A-38)

At the hearing, the IAM was represented by a senior partner of the firm of Vladeck, Elias, Vladeck & Lewis (Judith Vladeck). The Vladeck, Elias firm is one of the most prestigious firms in our city representing labor unions. If such relief was usual, or even desired by the union, to be sure, counsel

for the union would not have been remiss in neglecting to request such relief. Such a request was not made in the written memorandum submitted to the arbitrator following the hearing, or during the course of the hearing. (See Post Hearing Letter Memorandum to arbitrator by Judith Vladeck, page 7, (A-49).

Since the matter of interest was never submitted to the arbitrator, representatives of Kentile have never had an opportunity to address themselves to that issue. We submit that the award of interest was beyond the submission made to the arbitrator, and therefore, the award of interest exceeded the scope of his authority.

While the Courts have given arbitrators wide latitude in fashioning remedies in labor cases, arbitrators should not be permitted to act at their own caprice and make awards that are not authorized or sought by the employers or unions.

III.

The Arbitrator Exceeded His Authority
By Applying NLRB Procedures Which Are
Not Drawn From The Essence of the
Collective Agreement

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring

his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."

However, "[an arbitrator] does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. Steelworkers v. Enterprise Wheel & Car Corp.", 363 US 596 (1960) at 597.

If arbitrator Kupsinel had, in his award, found that pre-award interest was appropriate due to bad faith, delay or attempt to obstruct the intent of the contract by Kentile, he might well be drawing his award from the essence of the Agreement. However, he does not do this. Indeed, the only reason that can be inferred from his award for imposing pre-award interest is because the NLRB does it. If that is the reason, it serves, on its face, as its own indictment, showing the invalidity of the award.

An arbitrator is required to "draw his remedy from the essence of the collective bargaining agreement" between the parties, not from the practices of the NLRB.

The collective agreement is silent with respect to what occurs if the arbitrator finds that the Company did not have just cause for discharging an employee. The Union requested that the arbitrator reinstate the employees with "full back pay" (A-49). While the remedy requested by the Union is a reasonable interpretation of the Agreement and in line with the past practice of the parties, the arbitrator on his own not only reinstated the employees but did so with more than full back pay. With the application of interest, these employees actually suffered no punishment from their suspension since the amount of interest offsets their loss of income for the period of suspension.

IV.

Interest Is Not Applicable To Back Pay Awards As A Matter of Law or Equity

Equity does not compel the granting of pre-award interest. Just as Courts, in granting pre-judgment interest must make a finding to justify the exercise of their judicial discretion, they would abuse their discretion, just as the arbitrator here had done, by granting pre-judgment interest merely because some federal agencies do so.

During this period the grievants were not working for the Company and not collecting pay. They performed no work for the Company. The grievants did not have a contract of employment which have them the right to perform the work and Kentile was required to pay other employees to perform that work. Therefore, Kentile received no benefits from withholding the money from the grievants.

At common law an arbitration results not in a judgment but in a cause of action against the party who does not obey the award. Fidelity Deposit Co. of Maryland v. Waltz, 234 App. Div. 823, 253 N.Y.S. 583 (4th Dept., 1931).

It is a well settled principle of labor law that collective bargaining results in an accord as to terms and conditions of employment. "The result is not, however, a contract of employment except in rare cases; no individual employee has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement rather than a contract of employment." (Emphasis added) J.I. Case Co. v. NLRB, 321 U.S. 332, at 334 (1944).

The employee's right to re-employment after being terminated for cause by an employer results from a resolution

of a dispute over an unresolved grievance filed by the Union. The employee's right to be reinstated is inchoate until the dispute between the company and the union is resolved.

It has long been settled, and is not disputed by Kentile, that interest is applied from the date of the arbitration award. In those cases, the interest runs against the award, not against the back pay which would have been payable to the employee had the employee been working during the period of discharge. Meat & Allied Food Workers Local No. 248 v. Packerland Packing Co., 411 F.Supp. 1280 (E.D. Wis., 1976).

Where an arbitrator does not expressly award interest on back pay, the Labor Management Relations Act does not authorize the payment of such interest. Local Union No. 179, United Textile Workers of America v. Western Textile Products Company, 374 F.Supp. 633 (E.D. Mo., 1974).

In Western Electric Company Inc. v. Communications Equipment Workers, Inc., 409 F.Supp. 161 (Md., 1976), the Court refused to allow interest even from the date of the award since the arbitration award did not create a debt under the collective agreement.

V.

Arbitration Awards Are Not NLRB Remedies

The arbitrator's reasoning in granting interest on back pay is not drawn from the essence of the collective agreement between the parties or the relief requested of him, but upon procedures adopted by the National Labor Relations Board. (Kupsinel Opinion, page 9). (A-31)

Nothing in the collective agreement adopts or applies NLRB procedures to the relations between the IAM and Kentile. The arbitrator is without authorization to read such procedures into the contract.

Section 10(c) of the National Labor Relations Act authorizes the Board upon a finding that an unfair labor practice has been committed to require a respondent to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. The intent of the National Labor Relations Act is to cause the employer to remedy illegal conduct committed in violation of the Act. Such is not the case in an arbitration to determine if an employer had just cause to terminate an employee for refusal to work overtime.

The NLRB, in Isis Plumbing & Heating Co., 138 NLRB No. 97, in 1962, over fifteen years after the agency was created, first instituted the practice of imposing interest on back pay as part of enforcement of a statutory debt owed to the employee for the employer's violation of his statutory right. Interest was imposed as a remedy in addition to back pay to dissuade the employer from continued or future violations of the law.

It is apparent that an employer who requires an employee to work overtime, and in the opinion of one arbitrator imposes a sanction which exceeds that arbitrator's sense of proper discipline is not violative of a statute or any other law. Thus, the arbitrator should not impose, sua sponte, a remedy which a governmental agency has adopted for the purposes of coercing compliance with a federal statute.

CONCLUSION

While it is federal policy to encourage arbitration, the courts are counter-productive of that end when they assume a laissez faire attitude of refusing to reverse the "bizarre"

awards of arbitrators. Such a position only discourages employers (and unions) from entrusting their disputes to arbitrators since all parties to such proceedings would do so with knowledge that the remedy the arbitrator might impose would be sustained even if the remedy were one which the arbitrator was not authorized to impose, on which the parties had not been heard and a remedy which was not even requested.

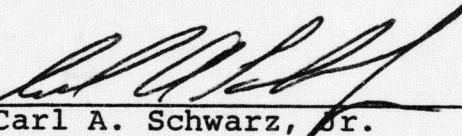
As this Court has said, the parties to a collective bargaining agreement should be guaranteed that they will find in the arbitrator not a "philosopher king" but one who will resolve their disputes within the framework of the agreement which they negotiated. Torrington Co. v. Metal Products Workers, 362 F.2d 677 (2nd Cir., 1966).

For the foregoing reasons, the judgment below should be reversed with an order vacating so much of the arbitrator's award as granted pre-award interest.

Respectfully submitted,

FELLNER AND ROVINS

By:


Carl A. Schwarz, Jr.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

ROBERT LA GRASSA, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 62-20 60th Rd.
MASPETH, NYC

That on the 10th day of JUNE, 1977,
deponent personally served the within BRIEF OF RESPONDENT-APPELLANT

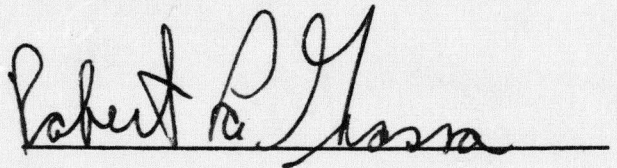
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

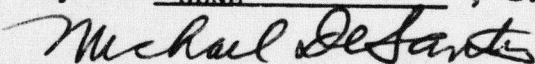
Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Petitioner-Appellee
1501 Broadway
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Sworn to before me this

10th day of JUNE, 19 77.



MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

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